IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-655

LONNIE CREEL, JR., *et als., etc.*,
Petitioners,

vs.

FRANK E. FREEMAN, *et als., etc.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

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LONNIE CREEL, JR., JACK SULLIVAN, CLINT FOREMAN, TOM W. GAINES, DAN WHITAKER, AND JAMES M. ELLISON, individually and for all others similarly situated,

Petitioners,

vs.

FRANK E. FREEMAN, E. K. BARNES, CLARENCE HENDRIX, EUGENE McDANIEL and DORIS ROBERTS, individually, as members of the Walker County Board of Education, and on behalf of all other school boards and school board members similarly situated; ROBERT E. CUNNINGHAM, individually and as Superintendent of Education of Walker County, and on behalf of all other Superintendents similarly situated; PROBATE JUDGE FLORA L. STEWART, SHERIFF HOWARD TURNER, and CIRCUIT CLERK SYLVESTER ANTON in their official capacities as members of the board of supervisors of elections and on behalf of all other boards of supervisors similiarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

STATEMENT OF THE CASE

This action began with a Complaint of Plaintiffs being filed on January 28, 1974, with present Petitioners seeking to represent the class of Plaintiffs which resided outside the corporate limits of any town having an independent school board.

The Petitioners reside outside the corporate limits of any city or town having an independent school board and the Respondents in said suit are the superintendent of education and members of the board of education and members of the board of election supervisors of Walker County. Each Respondent was originally sued as a representative of the class of officials of 36 other counties.

The District Court made an initial determination in favor of a class action status but after extensive discovery, the District Court ruled that the class action could not be maintained as to the Respondents.

Neither the class action question nor the three-judge Court question is subject to the Court's review in connection with this appeal.

Petitioners appealed the action of the lower Court and the Fifth Circuit Court of Appeals affirmed the ruling of the District Court.

The Petitioners contend that by allowing city residents of Jasper, Alabama and Carbon Hill, Alabama, both having independent school systems, both located in Walker County, Alabama, to vote for the members and for the chairman of the Walker County Board of Education, such dilutes the votes of proper non-city electors and denies them equal protection of the law in violation of the Fourteenth Amendment. The Petitioners specifically challenge the constitutionality of Title 52, §63, of *The Alabama* Code, 1940, as Recompiled in 1958.

Title 52, §63, of *The Code of Alabama,* 1940 as Recompiled in 1958, provides in part the following:

> "The County Board of Education shall be composed of 5 members, who shall be elected by the qualified electors of the county. . ." (Appendix Page A1).

A local act applying to Walker County fixes the qualifications of and provides for the election of a chairman and associate members of the County Board of Education. In Act No. 138 of the Special Session of the Alabama Legislature of 1965, in *Acts of Alabama,* Volume No. 1, at Page 188, we find in part the following:

> *Section 1* provides for the general supervision and control of the public schools of Walker County being vested in the County Board of Education consisting of a chairman and 4 associate members. . .
>
> *Section 2* provides that the Chairman of the Board shall be a resident and qualified voter of any district or beat in the county and that he shall be nominated and elected by the qualified voters of the entire county. . .
>
> *Section 3* provides that one member of the Board shall be a resident and qualified elector of each of the four districts from which members of County governing body are elected and that each district shall elect a member of the board of education. . . (Appendix Pages A1, A2, & A3).

Walker County surrounds the cities of Jasper and Carbon Hill on all four sides and no qualified voter in Walker County, including residents of Carbon Hill and Jasper, Alabama, are excluded from voting in the Walker County Board of Education election. The electors all vote for the Chairman and all vote for the Board member of their respective district.

Robert E. Cunningham, Superintendent of the Walker County Board of Education, resides within the City limits of Jasper, Alabama.

Location of Educational Facilities:

The Office of the Walker County Board of Education, which also houses the workshop and textbook center is located within the City limits of the City of Jasper, Alabama. The building is owned by the Jasper City Board of Education and is rented to the County Board for $1.00 per year.

The Walker Area Vocational School, under the supervision of the Walker County Board of Education, is also located within the City limits of Jasper, Alabama.

Joint Educational Activities:

The Walker County Board of Education and the Jasper City Board of Education have a "joint venture" known as the Walker Area Vocational School, which is located inside the City limits of Jasper, Alabama, and it is under the exclusive control of the Walker County Board of Education, who pays all operating costs. In 1974, 691 students attended the Walker Area Vocational School, 114 of which lived within the City limits of Jasper, Alabama. The Jasper City Board of Education contributed $212,500.00 toward its construction and pays $50.00 for each student residing within the City of Jasper who attends.

In 1974, the Jasper City Board of Education had an enrollment of 2,810 students. The Walker High School, located in the City limits of Jasper, Alabama, had an enrollment of 950, of which 488 students live outside the city limits. There are no limits on outside students attending the City schools.

Also, in 1974, the Carbon Hill School System had an enrollment of 965, of which 482 students live outside the

City limits. No fees were charged in connection with the out-of-city students.

The number of city students attending other county schools is unknown.

Finances

Revenues are obtained from various sources and one of such sources is a 4 mill tax assessed and collected county-wide including on the residents of Jasper and Carbon Hill, Alabama, and the amount of tax collected on lands within the City of Jasper, Alabama was $35,501.80 in 1974, of the total of $394,524.28, which was the total of the 4 mill tax collected county-wide and paid over to the Walker County Board of Education. The $35,501.80 amounts to 8.99% of the total amount paid over to the Walker County Board of Education by virtue of the 4 mill tax.

SUMMARY OF ARGUMENT I

The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by certiorari.

It is apparent that the allowing of the residents of the Cities of Jasper and Carbon Hill, both having independent school boards, to vote for the chairman and members of the Walker County Board of Education neither "dilutes" or "debases" the votes of the non city residents, nor denies the non-city residents the equal protection of the law since the residents of the cities have a legitimate interest in voting insuch elections.

The legitimate interest of the cities is evidenced by the taxes that are paid which make up a portion of the budget of the Walker County Board of Education; the investment of moneys made by the Jasper City Board of

Education into the Vocational School, which is a "joint venture" with the Walker County Board of Education, and which facility is located within the corporate limits of the City of Jasper, Alabama and which is operated under the exclusive control of the Walker County Board of Education, with city students attending from Jasper. Further, county students comprise one half of the student body of the Walker High School and Carbon Hill High School, both city schools, and the students attend without the payment of fees.

It is also evident that Petitioners cannot demonstrate that Title 52 of *Code of Alabama*, (Appendix Page A1) or Act No. 138, *Acts of Alabama*, (Appendix Pages A1, A2, & A3), create an arbitrary classification, show discrimination, or that each or either is based on irrational objectives or that the objectives are wholly irrelevant means of achieving the States' objectives.

I. THE DECISION OF THE LOWER COURT IS CLEARLY CORRECT.

ARGUMENT

Petitioners predicate their attack on Title 52, §63, of *The Code of Alabama*, 1940, as Recompiled 1958 (Appendix Page A1), and on Act No. 138, Special Session of The Alabama Legislature, 1965, *Acts of Alabama*, Vol. 1 (Appendix Pages A1, A2 & A3) on the conception that city residents cannot vote in county elections without "diluting" the vote of those residents of rural areas outside the cities of Jasper and Carbon Hill, Alabama. "Dilution" as used by the Petitioners, is a clever disguise under which Petitioners are trying to get this Court to do what the Supreme Court has said the Equal Protection Clause will not permit: the "fencing out" from county elections of a substantial part of counties' residents solely because they reside in an additional jurisdiction, i.e., a town. *Evans v. Cornman*, 398 U.S. 419, 423, (1940). This case does not involve "dilution" as that term has been interpreted by the Courts. Each person who votes in these elections has his vote counted as "one". No voter's ballot is weighed more heavily than that of "others". *Wesberry v. Sanders*, 376 U.S. 1, (1964); *Reynolds v. Sims*, 377 U.S. 533, (1964); *Gray v. Sanders*, 372 U.S. (1963); and *Hadley v. Junior College District*, 397 U.S. 50 (1970).

This action is unusual in that Petitioners do not seek to guarantee the right to vote to a previously disenfranchised class, but instead, seek to take away the right to vote from persons presently enjoying that right. Petitioners allege a dilution of their vote, not through a system of improperly apportioned districts, but through a process of permitting persons to vote who allegedly have no interest in the election, and therefore, no right to participate therein.

In *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), the Court said:

> "Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

In *Kramer v. Union Free School District*, 395 U.S. 631, 626, 627 (1969), the Court said:

> "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.
>
> Thus, State apportionment statutes, which may *dilute* the effectiveness of some citizens' vote, receive close scrutiny from the Court, no less rigid an examination is applicable to statutes *denying* the franchise to citi-

> zens who are otherwise qualified by residence and age. States granting the franchise on a selective basis always pose the danger of denying some citizen any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged State statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling State interest."

There is no Constitutional requirement that all voters participating in an election must be similarly affected by the outcome of the election, nor is there a Constitutional requirement that the interest of all voters must be identical. In *Kramer, supra,* at 395 U.S. 632, the Court said:

> "Whether classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the laws depends, *inter alia,* on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal."

In *Cipriano v. City of Houma,* 286 F. Supp. 823 (1968), we find the following:

> "The Equal Protection Clause does not command state legislatures to make their laws conform to hydraulic principles by seeking the common—and lowest level. Equal Protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

Section 63 of *The Code of Alabama,* 1940, as Recompiled 1958, (Appendix Page A1), as well as Act 138 of the 1965 Session of The Alabama Legislature, *The Acts of Alabama,* Volume I, (Appendix Pages A1, A2 & A3), do not create an arbitrary classification, and the Petitioners cannot discharge their heavy burden by demonstrating that either Section 63 or Act Number 138, create such an arbitrary classification. *McGowan v. Maryland,* 366 U.S. 420 (1961). Proof that §63 or Act 138 "affects some groups of citizens differently than others" (*McGowan v. Maryland,* 366 U.S. at 425, or that "in practice [it] results in some inequality" (*Spahous v. Savannah Beach,* 207 F. Supp. 688 (S.D. Ga. 1962) *aff'd per curiam,* 371 U.S. 206 (1962)), is *not sufficient,* because "every discrimination between groups of people" does not rise to the dimensions of "a Constitutional denial of equal protection", *Oregon v. Mitchell,* 400 U.S. 112 (1970). In addition to proving the discrimination, the Petitioners must demonstrate that §63, Title 52, *The Code of Alabama,* 1940, as Recompiled 1958 (Appendix Page A1), or that Act 138 of *The Acts of Alabama,* 1965, Volume 1 (Appendix Pages A1, A2 & A3), are not based upon *rational objectives* (*Spahous v. Savannah Beach, supra* at 692) or that they are "wholly irrelevant" means to achievement of the States' objective. *McGowan v. Maryland,* 366 U.S. at 425. This places an impossible burden on Petitioners, because §63, and Act 138 are clearly rational means to a rational end: to secure the vote in school board elections for all residents of Walker County. All the voters vote for the position of Chairman of the Board of Education and all vote for the school board member of their district.

The Petitioners in this cause cannot demonstrate that §63 or that Act 138 create an arbitrary classification. Neither §63 nor Act 138 discriminate against anyone be-

cause it simply gives the right to vote to all qualified electors in Walker County, Alabama.

The classification must have some reasonable basis and does not fail because it in practice results in some inequality. If any state of facts reasonably can be conceived that will sustain it, the existence of that state of facts must be assumed. And those who assail the classification must carry the burden that it does not rest upon any reasonable basis, but it is essentially arbitrary. In *McGowan v. State of Maryland,* 366 U.S. 420, the Supreme Court stated the rule as follows:

> "Although no precise formula has been developed, the Court has held that the 14th Amendment permits the state a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the states' objectives. State legislatures are presumed to have acted within their Constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts can reasonably be conceived to justify it."

(I) *Recent Supreme Court Decisions Affecting Petitioners' Position:*

Petitioners, in the instant case, asked for judicial relief, circumscribing the residence requirement for county voting to achieve the exclusion of town residents, so that a substantial segment of the population will be "fenced out" in school affairs in the county. In several recent cases, the Supreme Court has refused to let State officials do what the Petitioners are asking this Court to do in the instant case. There are three lines of authority in recent decisions of the Supreme Court which militate against the Petitioners' position. The Petitioners can prevail in this case only if the

Court ignores all three lines of authority. *First,* the Equal Protection Clause looks with disfavor on efforts to "fence out" voters from participating in elections in which they have some interest. *Evans v. Cornman,* 398 U.S. 419 (1970); *Carrington v. Rash,* 380 U.S. 89 (1965); *Kramer v. Union Free School District,* 395 U.S. 621 (1969); and *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). *Second,* the Equal Protection Clause does not permit the disenfranchisement of otherwise qualified voters on the grounds that they are "less interested" than others in the outcome of an election. *Kramer v. Union Free School District,* 395 U.S. 621, (1969); *Cipriano v. Houma,* 395 U.S. 701 (1969); *Evans v. Cornman,* 398 U.S. 419 (1970); and *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). *Third,* the Equal Protection Clause looks with suspicion on unreasonably restrictive *residence* requirements. *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Evans v. Cornman,* 398 U.S. 419 (1970); *Carrington v. Rash,* 380 U.S. 89 (1965); *Oregon v. Mitchell,* 400 U.S. 112 (1970); and *Amos v. Hadnot,* 405 U.S. 1035, *aff'ing* 320 F. Supp. 107 (M.D. Ala. 1970).

(II) *Cases of Major Importance Supporting Respondents' Positions:*

Five "Equal Protection" Cases should be considered in connection with the case at hand. All five cases join to place an insurmountable burden on the Petitioners and they compel the conclusion that this Court must sustain the validity of §63, and Act No. 138. In *Evans v. Cornman,* 398 U.S. 419, (1970), the United States Court condemned the Maryland Registration Boards' effort to exclude from participation in the State elections, those people who lived on a federal enclave. The Court reasoned that the Federal employees in question had an *obvious interest* in the affairs of the *state jurisdiction which surrounded them* (emphasis added).

The United States Court of Appeals for the Fifth Circuit in *Glisson v. Savannah Beach,* 346 F. 2d 135 (5th Cir. 1965) sustained the Constitutionality of a statute which permitted voting in the municipal elections of Savannah Beach by persons owning property in the town, who resided outside the City limits in outlying Chattam County. In a rationale equally applicable to the case at bar, that Court explained as follows, 346 F. 2d at 137:

> 'It is apparent from the fact of the legislation that there could be a logical and sensible reason for permitting non-residents owning property in municipality to vote on an equal basis with the resident persons . . . *The nexus between the two is that each of them obviously has an interest in the operation of the city government.*"

In a companion case, the United States Supreme Court affirmed the same decision reached by a "three-judge" district court. *Spahous v. Savannah Beach,* 207 F. Supp. 688 (S.D. Ga. 1962) *aff'd per curiam,* 371 U.S. 206 (1962).

In the case of *Clark v. Greenburgh,* 436 F. 2d 770 (2nd Cir. 1971), the United States Court of Appeals for the second Circuit sustained a statute permitting city residents to vote in county elections. The Court rejected a "dilution" argument like the one made in this case, and reasoned that a county residents' vote is not "diluted" simply because he might have a greater interest in the outcome of a county election than other voters who live in the city. Noting that the city residents did have an interest, however small, in the outcome of county elections, the Court pointed out that city residents paid about 5% of the taxes levied by the county and that they had access to the county's recreational facilities.

Finally, in *Rutledge v. Louisiana,* 330 F. Supp. 336, (W.D. La. 1971), a case on "all-fours" with the instant

case, a United States District Court sustained a statute permitting residents of a city with a separate school system to vote in board of education elections in the surrounding parish. The Court refused to "fence out" city residents who had at least *some* interest in the county election, the Court based its interest on three facts, all of which are present in the case, viz: (1) some city residents attended parish schools; (2) city residents paid part of the taxes used to run the parish schools; and (3) part of the parish school system's facilities were located in the city. This is exactly the situation in Walker County, in that some residents attend county schools; city residents pay part of the taxes used to run the county schools; and part of the county school system's physical facilities are located within the city. It appears that a common thread is contained in the case of *Glisson, Spahous, Clark* and *Rutledge,* in that they all contain a judicial reluctance to interfere with State legislative enactments extending the right to vote to a class of voters, so long as the class has *some tangible* interest, irrespective of the degree, in the outcome of the election in which they are permitted to participate. This judicial reluctance logically follows the principle that, since State legislatures have the *primary* responsibility for fixing voter qualifications for local elections, the Equal Protection Clause permits them a "broad discretion." *Lassiter v. North Hampton County Board of Elections,* 360 U.S. 45 (1959). Clearly, this "broad discretion" must extend to permitting the Alabama Legislature to conclude that the citizens of Carbon Hill and Jasper, Alabama, have sufficient interest to participate in the affairs of the county which surrounds them, since it appears that the voters residing in the city are substantially affected by the decisions of the county board and that they have a substantial interest in the election of the county board, since the county

maintains, operates and supervises the Walker Area Vocational School, which includes those students residing with the city, Walker County Board of Education Office, textbook center, and garage, is located within the City limits of Jasper, Alabama, and the residents of the City of Jasper and the City of Carbon Hill, Alabama, assist in paying a portion of the taxes with which the Walker County Board of Education operate. These functions of the county boards directly and substantiably affect residents of these cities. *Hadley v. Junior College District of Metropolitan Kansas City,* 397 U.S. 50, 54 (1970).

Because of the above reasons and because the same considerations prevailed in *Glisson, Spahous, Clark* and *Rutledge,* we feel that the same considerations command a course of judicial restraint in the case at bar.

The Petitioners also allege that Title 52 of §63, *The Code of Alabama,* 1940, as Recompiled 1958, creates a "dual voting" situation but this is incorrect in the true consideration of the same. The point that Petitioners are making is that because of the provision of §63, and Act No. 138, the city residents of Jasper and Carbon Hill enjoy the additional right of voting for county school board members.

There seems to be no problem with allowing city residents the "vote" since they are also county residents and since they are likewise allowed to vote for County Sheriff and County Commissioners (Ala. Constitution, Act V, 138, and Amendment 35) (Appendix Page A3), even though the cities have their own police forces and even though the residents look to the local city or town officials for the paving of streets and such other benefits.

Instead of being classed as a "dual voting" situation, it would appear more correctly classed as an "additional voting" privilege because such city residents pay taxes, have

requisite interest in the County Board of Education activities and because of joint activities between City Boards and the County Board of Education.

Finally, the Court's attention is directed to three additional considerations, not averred to above, which command a course of judicial caution.

First, as the Second Court of Appeals pointed out in *Clark v. Town of Greenburgh,* 436 F. 2d 770 (2nd Cir. 1971), it might well *violate* the Equal Protection Clause to exclude *bona fide* county residents from participating in county affairs *solely* because they happen to be inhabitants of a town.

Second, based on the undisputed facts contained above, Carbon Hill and Jasper residents have some interest, however remote, in the school affairs of Walker County. Hence, they can be excluded from participating in those affairs only if this Court utilizes a "calculus of interest" test which compels the disenfranchisement of a class of voters who ostensibly have *less* interest than other voters in the outcome of an election. Two reasons are evident why such a test should not be given this Court's sanction. For one, it would dignify speculation as to an extent that the law cannot countenant. The physical location of one's home does not necessarily dictate the degree of his interest in education. Neither does it fall that one who is interested in education in Carbon Hill or Jasper, Alabama, is *less* interested in Walker County. To the contrary, many of the strongest supporters of quality education in Carbon Hill and Jasper, Alabama, are the strongest supporters of quality education in Walker County. For the second reason, judicial economy calls for the rejection of such a test because it would inevitably generate many new controversies and many new spin off cases.

Third, if the Petitioners prevail, then this precedent will lead to new cases challenging the rights of city inhabitants to vote in elections for Probate Judge, County Commissioners, and Sheriff. This case, if the Petitioners succeed, will signify the beginning of a campaign in the courts to effectuate fundamental changes in the relationship between city and county government in Alabama. Any spirit of cooperation presently existing between state, county and local government would be hampered and education would reap the fruits of such action.

If cities and counties are to be made mutually exclusive jurisdictions in Alabama, the demand for this fundamental change should be addressed, initially to the State Legislature. As noted in *Glisson v. Savannah Beach,* 346 F. 2d 135 (5th Cir. 1965), there has been no allegation or evidence shown on behalf of Petitioners that they are foreclosed from obtaining the relief that they may be seeking from the Legislature of the State of Alabama, and Petitioners in this case are not foreclosed from obtaining relief from the legislature as were the Petitioners in *Baker v. Carr,* 269 U.S. 186.

SUMMARY OF ARGUMENT II

Petitioners have labored in their attempts to convince the Court that this case is in conflict with the case of *Locklear v. North Carolina State Board of Elections,* 514 F. 2d. 1152 (4th Cir. 1975), wherein the Court held that the interest of the city voters in functions performed by the county boards, which were namely: student transportation, the educational resource center and the projects for special students, individually and collectively, did not amount to a compelling state interest and that city voters could not participate in the election of County School Board members.

The *Locklear* case differs from the case at hand in the areas of taxes being paid by the cities of Jasper and Carbon Hill which are used to make up a portion of the budget of the Walker County Board of Education; operation of a "joint venture" vocational school which is located within the corporate limits of the Jasper City Board of Education and which is operated exclusively by the County Board of Education, but which was constructed in part by substantial moneys from the City of Jasper to which facility city students from the City of Jasper attend and further that county students comprise about one half of the student body for the largest high school located in the City of Jasper and Carbon Hill. The present case also differs from *Locklear* in the manner of voting for board members in that *Locklear,* 11 county board members were elected, 7 of which were elected by all voters residing in 6 jurisdictions, both county and five cities, and four were elected exclusively by the voters of the county jurisdiction, excluding residents of the cities. In the case before the Court, the Chairman is elected at large and one member is elected solely by the votes of each of 4 individual districts, giving the residents of said districts all a vote for the Chairman and one vote for the respective member for his district.

II. THERE IS NO CONFLICT IN THIS DECISION AND NO QUESTION OF IMPORTANCE IS PRESENTED.

ARGUMENT

Petitioners contend that the decision below is in conflict with the decision of the Fourth Circuit in *Locklear v. North Carolina State Board of Elections,* 514 F. 2d 1152 (4th Cir. 1975). *Locklear* can be distinguished in several

ways from the case at hand. In *Locklear,* there were six Boards of Education, five of which were city Boards of Education, and one of which was a County Board of Education. The County Board of Education had eleven members of which seven were elected *by the vote of the City units and the County residents* (emphasis added) and four persons were elected exclusively by the County electorate. Also, in *Locklear,* the facts showed that *each Board of Education had exclusive geographical jurisdiction* (emphasis added) within the area that it operated and there was no showing that there was any tax collected in the City administrative units which went to make up the revenue of the County School Board. Also, in *Locklear,* the Court found that the only connection between the County and City Boards was the following: (a) The County Board of Education provided all of the transportation for all school boards in the County, (b) The County and City Boards had a joint function, being an Educational Resource Center, which was used by all of the Boards, (c) The County Board of Education administered certain Federal projects and (d) The County Board of Education had the right to annex certain property to the City which had formerly not been City property with the consent of City residents and through approval of certain other persons and agencies. The Court, in *Locklear,* felt that there was no compelling state interest to allow the City residents to vote in that particular case and made an observation that there was nothing to show that the agreements made between the City and County Boards were not subject to being changed.

The case at hand is distinguished from *Locklear* in that taxes flow from the Cities of Carbon Hill and Jasper to the Walker County Board of Education, which forms a part of the county school board budget. Also, the Walker County Board of Education exclusively owns and operates

the Walker Area Vocational School within the geographical jurisdiction of the Jasper City Board of Education and that this was not subject to being changed since the Walker County Board of Education owns and exclusively controls the same. Differences are also evident in the manner in which the School Board members were elected. In the fact that the Board of Education members of the City of Jasper and Carbon Hill are appointed and not elected as they were in *Locklear.* The argument made in *Locklear* that the joint agreements were subject to being changed, is substantially affected by the case of *Little Thunder v. State of South Dakota,* 518 F. 2d 1253, in which the Court refused to consider the argument of the State that the unorganized counties might choose to form an organized county, but the Court said the issue at stake was whether the residents of the unorganized counties *"presently"* (emphasis added) have a voice in their government.

In *Little Thunder v. State of South Dakota,* 518 F. 2d 1253, the Plaintiffs who were residents of unorganized counties, brought an action contending that state law preventing them from voting for County government officials was in derrogation of their rights to equal protection of the law. The State of South Dakota is divided into 67 county units, which are further divided into organized and unorganized counties. A statutory method was enacted of organizing a county government through petitions and referrendum and at the present time, the only unorganized counties are those in which the Plaintiffs reside. The organized counties have a full compliment of elected county officials whose task is to administer the affairs of local government. The residents of the unorganized counties were not permitted to vote for the county officers in the organized counties. The State also argued that the unorganized counties could organize and divest the organized

county government of power and that this contingency justifies restriction of the franchise. The Eighth Circuit Court of Appeals held that the District Court had applied the wrong legal standard in assessing the Constitutionality of the State's action, and that there existed under the record no compelling state interest justifying the denial of Plaintiffs' right to vote for their governing officials. The Court was concerned with the question of whether the residents of the unorganized counties "*presently*" have a voice in their local government.

Petitioners apparently were concerned about the comment by The Court of Appeals that there is no domination shown by the residents of the City of Jasper and Carbon Hill over the County School Board elections.

Such domination existed in *Locklear v. North Carolina State Board of Elections*, (supra) since there were eleven members of the county board of education of which seven were elected by the vote of the city units and the county residents elected only four members through its exclusive vote. This was obviously unfair, but such does not appear in the case at bar, and with all of the apparent differences, *Locklear* simply cannot be considered controlling authority in view of the facts of the present case since Petitioner cannot support any argument that *Locklear* is substantially undistinguishable from the case at hand.

Petitioners also question whether they should have the burden of proving a compelling state interest in excluding persons from voting.

It is apparent from *McGowan v. State of Maryland*, 366 U.S. 420, that those who assail the classification must carry the burden that it does not rest on any reasonable basis, but that it is essentially arbitrary. Not only have the Petitioners failed in carrying out this burden, they have failed in their

inability to show that Act 138, *Acts of Alabama* (Appendix Pages A1, A2, & A3) is arbitrary, *McGowan v. State of Maryland, supra,* or that discrimination is shown or that they are based on irrational objectives, *Spahous v. Savannah Beach,* 207 *supra,* 688 (1962), or that they are wholly irrelevant means to achieve State objectives, *McGowan v. State of Maryland,* 366 U.S. 420.

Petitioners observe that the Supreme Court has repeatedly held that in elections of general interest, restrictions of the franchise other than residence, age and citizenship must promote a compelling state interest in order to survive constitutional attack. Respondents agree that such is a fair statement of the law as shown in *Hill v. Stone*, 421 U.S. 389 (1975), and other cases, but Respondents feel that Petitioners have overlooked the significant key to this line of cases. This line of cases is based on the "restriction of the franchise."

In the case of *Hill v. Stone,* 421 U.S. 389 (1975), residents of Fort Worth, Texas brought an action challenging provisions limiting the right to vote in city bond issue elections to persons who had "rendered" property for taxation. The Court held that such *restriction* of sufferage violated the Equal Protection Clause.

There is no restriction of the franchise in the case at hand since everyone is allowed to vote for Chairman of the County Board of Education and for the particular board member of the district in which the voter resides.

The decision below is supported by the case of *Clark v. Town of Greenburgh,* 436 F. 2d., 770 (2d Cir. 1971); *Glisson v. Savannah Beach,* 346 F. 2d. 135 (5th Cir. 1965) and *Rutledge v. Louisiana,* 330 F. Supp. 336 (1971) and the granting of summary judgment is supported by the various facts and authorities cited.

The non-city resident Petitioners further contend that even if revenue supports entitlement to city residents to the right to vote, that the same should not be applicable in the case before the court. Without delaying this response, it seems sufficient to point out that to be considered are the following: county student attendance to city schools, the vocational school located within the jurisdiction of the City of Jasper and the City Board of Education as well as the other reasons previously mentioned. The Court in *Clark v. Town of Greenburgh*, 436 F. 2d. 770, at 772:

> "it is not for the court to determine whether the quantum of services voters receive justifies the taxes they pay."

It appears from a comparison of *Clark* and the case at hand that the latter has a even stronger factual situation that demands the right to vote for the residents of the Cities of Carbon Hill and Jasper.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

This ..... day of December, 1976.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that as a member of the bar of the Supreme Court of the United States, all parties required to be served have been served copies of the Brief in Response to Petition for Writ of Certiorari in compliance with the Rules of the Supreme Court of the United States, by depositing each in the United States mail, sufficient postage prepaid, addressed to the following:

1. Mr. Edward Still, 601 Title Building, Birmingham, Alabama 35203.

2. Mr. Laughlin McDonald, 52 Fairlie Street N.W., Atlanta, Georgia 30303.

3. Mr. Neil Bradley, 52 Fairlie Street N.W., Atlanta, Georgia 30303.

4. Mr. Melvin L. Wulf, 22 East 40th Street, New York, New York, 10016.

Done this ..... day of December, 1976.

PHILLIP A. LAIRD
Counsel for Respondents

APPENDIX

APPENDIX

Code of Alabama, Title 52, Section 63, 1971 Cum. Supp. To Vol. Twelve, Page 29.

§63. Members—The county board of education shall be composed of five members, who shall be elected by the qualified electors of the county. They shall be persons of good moral character, with at least a fair elementary education, of good standing in their respective communities, and known for their honesty, business ability, public spirit and interest in the good of public education. No member of the county board of education shall be an employee of said board; provided, that in counties having populations of not less than 96,000 nor more than 106,000 according to the most recent federal decennial census, not more than one classroom teacher employed by the board may serve as a board member and also as a teacher. (1927 School Code, §87; 1964, 1st Ex. Sess., p. 346, appvd. Sept. 4, 1964.)

ACTS OF ALABAMA, SPECIAL SESSION 1965, Vol. 1, Pg. 188, Act No. 138:

To provide further for the control, supervision and administration of public schools in Walker County; to fix the qualifications and to provide for the election of a chairman and associate members of the county board of education; to fix their terms of office; to provide for their compensation, and the manner of filling vacancies in office.
Be It Enacted by the Legislature of Alabama:

Section 1. The general supervision and control of the public schools of Walker County shall be vested in a county board of education, which shall consist of a chairman and four associate members.

Section 2. The chairman of the board shall be a resident and qualified voter of any district or beat in the county, a person of good moral character, of good standing

in his community, known for his honesty, business ability, public spirit and interest in the good of public education. He shall be nominated and elected by the qualified voters of the entire county; he shall take office on the day following his election and qualification and shall serve for a term of six years and until his successor is elected and qualified.

Section 3. One member of the board shall be a resident and qualified elector of each of the four districts from which members of the county governing body are elected. Each shall be a person of good moral character, of good standing in his community, known for his honesty, business ability, public spirit and interest in the good of public education. One member of the board shall be nominated and elected by qualified electors of district one; one member shall be nominated and elected by the qualified electors of district two; one member shall be nominated and elected by the qualified electors of district three; one member shall be nominated and elected by the qualified nominated and elected by the qualified electors of district four.

Section 4. The incumbent chairman and members of the board shall hold office until their respective terms expire. The successor members of the board to be elected from districts one and three shall be elected at the general election in 1930; the successor members of the board to be elected from districts two and four shall be elected at the general election in 1968; the successor chairman of the board shall be elected at the general election in 1966. The chairman and members shall take office immediately following their election and qualification and each shall serve for a term of six years and until his successor is elected and qualified. Vacancies in office of chairman or associate member of the county board of education shall be filled in the manner prescribed by general law.

Section 5. The members of the board shall be compensated at the rate of fifteen dollars ($15.00) per diem for attending meetings for the board but not to exceed two meetings in any one month. The chairman of the board shall be compensated at the rate of fifty dollars ($50.00) per month irrespective of the number of meetings attended.

Section 6. All laws or parts of laws which conflict with this Act are repealed.

Section 7. The provisions of this Act are severable. If any of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 8. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved March 29, 1965.
Time: 4:50 P.M.

CONSTITUTION OF ALABAMA, CODE OF ALABAMA, Vol. 1, Pg. 197, ARTICLE 5, Section 138:

Sec. 138. A sheriff shall be elected in each county by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and he shall be ineligible to such office as his own successor; provided, that the terms of all sheriffs expiring in the year nineteen hundred and four are hereby extended until the time of the expiration of the terms of the other executive officers of this state in the year nineteen hundred and seven, unless sooner removed. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution. If the sheriff be impeached, and there-

upon conviction, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

CONSTITUTION OF ALABAMA, CODE OF ALABAMA, Vol. 1, Pg. 372, AMENDMENT 35.

XXXV

Sheriff Succeeding Self.

Section 128 of Article 5—A sheriff shall be elected in each county by the qualified electors thereof who shall hold office for a term of four years unless sooner removed, and he shall be eligible to such office as his own successor. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached, under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he has been elected or appointed to serve as sheriff. (1936-37, Ex. Sess., p. 269.)